BANK BUMIPUTRA (M) BHD.

v.

ESAH ABDUL GHANI

SUPREME COURT, KUALA LUMPUR
ABDUL HAMID OMAR CJ (MALAYA)
LEE HUN HOE CJ (BORNEO)
HASHIM YEOP SANI SCJ
[CIVIL APPEAL NO. 340 OF 1984]
10 JUNE 1985

CIVIL PROCEDURE: *Judgment - Enforcement of - Election by judgment creditor - Guarantee - Liability of guarantor - Co-existent with that of principal debtor.*

BANKRUPTCY: *Creditor's petition - Jurisdiction of Court - Legal and moral problem.*

The appellant had granted a loan of RM16,000 to one Mohd. Yusoff. The loan was secured by a charge over 2 properties and a guarantee by the respondent. Following a default by the principal debtor to repay the loan the appellant had initially taken out foreclosure proceedings on the charged properties but abandoned the said proceedings as one of the co-owners of the charged properties had died. The appellant then proceeded against the respondent under the guarantee, and the principal debtor. After obtaining judgment the appellant instituted bankruptcy proceedings against both.

At the hearing of the creditor's petition the respondent appeared and opposed the petition. The Judge of the Bankruptcy Court ordered a stay of the creditor's petition pending the decision of the petition against the principal debtor. The appellant appealed.

Held:

[1] The appellant having obtained a proper judgment against the respondent (as a surety) is entitled to elect to enforce the judgment by the appointment of a receiver under O. 45 r. 1(d) of the Rules of the High Court 1980.

[2] The charge over the 2 properties and the guarantee were merely collateral securities.

[3] The respondent, as guarantor, has no special right to demand that the appellant, as creditor, should call upon the principal debtor to pay off the debt before asking the respondent to pay pursuant to the guarantee.

[4] The Court is concerned with a legal and not a moral problem and accordingly notwithstanding the good intentions of the Judge of the Bankruptcy Court he has no jurisdiction either to dismiss or to stay the creditor's petition.

[Appeal allowed.]

Cases referred to:
Lloyds v. Harper [1880] 16 Ch D 290
Ng Yik Seng & Anor. v. Perwira Habib Bank Malaysia Bhd. [1980] 2 MLJ 83
Duncan, Fox & Co. v. North and South Wales Bank [1880] LR 7 HL 348
Ewart v. Latta [1865] 4 Macq 983

Legislation referred to:
Rules of the High Court 1980, O. 45 r. 1(d)

Other sources referred to:
Law & Practice of Banking, Milnes Holden, Vol. 2, para. 18-12
Paget on Banking, 8th Edn., p. 618
Halsbury's Laws of England, Vol. 20, 4th Edn., p. 87, para. 159, p. 101, para. 186

For the appellant - Sivasubramanian; M/s Clough Thuraisingam, Sivasubramanian & Ramdas
For the respondent - F.Y. Wong; M/s Peter Lai & Wong

JUDGMENT

Lee Hun Hoe CJ (Borneo):

We allowed the appeal and stated we would give reasons later. We do so now. The only issue is the question whether the learned Judge was right to stay the creditor's petition against the respondent.

On 21 May 1979 the respondent Esah binti Abdul Ghani became a guarantor (the surety) for a loan of RM16,000 granted by the appellant Bank Bumiputra Malaysia Bhd. (the bank) to Mohd. Yusoff bin Haji Ibrahim (the principal debtor). As security the bank also held a charge over two properties EMR 877 Lot 937 and EMR 878 Lot 939 in Luit, Pekan belonging to the principal debtor and two others, namely Alias bin Haji Ibrahim and Rokiah binti Haji Ibrahim. The two pieces of land were valued at RM21,500 on 4 January 1979. The principal debtor failed to pay the loan. On 20 August 1980 the bank took foreclosure proceedings on the land but before the issuance of an order of sale one of the owners died. So foreclosure was not proceeded with. Instead, the bank took out a writ against the principal debtor and the surety. On 14 October 1983 judgment was entered against both. On 7 April 1984 based on the said judgment, a bankruptcy notice was issued calling on the surety to pay the amount owing. The surety failed to do so. On 11 August 1984 the bank filed a creditor's petition. On 27 October 1984 the surety filed a notice of intention to oppose the petition, that is, to prevent a receiving order being made against her. The learned Judge stayed the creditor's petition pending the decision of the petition against the principal debtor. Hence, the appeal.

Just because the bank did not proceed with the foreclosure proceedings on the death of one of the owners but by going after the surety, the learned Judge castigated the bank for adopting such method which he considered to amount to an extortion. At p. 20 of the appeal record he said:

> ... To my mind such method albeit may be legal, may amount to an abuse of the process of the Court. Furthermore, as conceded by the Counsel for the bank, the bank had also issued a bankruptcy notice to the principal debtor. By virtue of this the bank has two avenues to proceed and recover its money. In the final analysis, this petition against the respondent may turn out to be a useless piece of litigation.

It must be pointed out that we are not concerned with moral but legal problem. The bank has obtained a proper judgment against the surety and is entitled to enforce the judgment. The bank elected to do so under O. 45 r. 1(d) of the Rules of the High Court 1980 which judgment may be enforced by "the appointment of a receiver". Further, as Fry J in *Lloyds v. Harper* [1880] 16 Ch D 290 stated:

> A guarantee, like every other contract, must be construed reasonably; it must be construed by the words used but also with regard to the surrounding circumstances.

In this country letters of guarantee seem to be the most common and popular documents used by the banks despite the fact that a guarantor may turn out to be just as unreliable as the principal debtor. Nevertheless, the bankers appear to be quite satisfied with such a document which enables them to proceed with both the principal debtor and the guarantor. Sometimes one wonders if a guarantor realises his responsibility when he gives his guarantee. He can be called to pay the debt of the principal debtor - a debt which in most cases he is in no way responsible. Therefore, it is quite understandable that he is invariably reluctant to pay the debt of another and will deny liability on the flimsiest ground.

The letter of guarantee in this case is clear. Paragraph 3 states that the guarantee shall be without prejudice to and shall not be effected nor shall the surety be released or exonerated, *inter alia*, by way of the following matters:

> (a) Any securities negotiable or otherwise including other guarantees which the bank may then or any time thereafter hold from the principal debtor or any other person or persons in respect of any money thereby guaranteed; and
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> (b) Any time given or extended to the principal debtor and/or any security instruments guarantee or contract or any other indulgence granted to or compromise composition or arrangement made with the principal debtor and/or any other person or persons whether with or without consent or notice to the surety.

As regards the charge on the two pieces of land the learned Judge thought that this constituted the first and real security of the loan. In reality this is not so. In fact the charge and the guarantee were merely collateral securities.

Reference was made to *Ng Yik Seng & Anor. v. Perwira Habib Bank Malaysia Bhd.* [1980] 2 MLJ 83. There the respondent granted an overdraft to a company. The two appellants and two other directors stood as guarantors in their personal capacities. When the overdraft was not repaid the respondent sued the guarantors. Subsequently, the respondent applied for summary judgment against the two appellants who denied executing the guarantee. The Senior Assistant Registrar allowed the application but this was reversed by the High Court which gave the appellants conditional leave to defend on payment of the sum of RM125,000 into Court. The decision was upheld on appeal on the ground that there was a triable issue. It is true that the Court also dealt with the contention that in law and equity the appellants should only be called on to meet their guarantees if there should be any deficit after the sum to be realised from the sale of the charged property had been determined. At p. 84 we find this passage:

> This contention is not without attraction. We have not heard any substantial submissions at length on this point which was not ruled on in the Court below, but while it is uncertain that the claim against the appellants in the circumstances of a charge is bad "in law and equity', it is, in our view, clear that in such circumstances an action to obtain judgment against the guarantors which would open avenues of execution to the chargee and even bring the guarantors into the Bankruptcy Court when in the final accounting, the appellants needed not to be called to honour their guarantee, would be an abuse of the process of the Courts.

This passage was cited and relied on by the learned Judge. It is to be observed that what was stated was merely on *obiter dictum.* It has no bearing to the facts of that case which was concerned merely with the question whether the learned Judge was right to give the appellants conditional leave to defend. The guarantor has no special right to demand that the creditor called upon the principal debtor to pay off the debt before asking the guarantor to pay. At p. 207 of *Law & Practice of Banking***,** Vol. 2 by J Milnes Holden under para. 18-12 it is clearly stated:

> ... it has been suggested that, as soon as the guaranteed debt has become due and before the guarantor has been asked to pay it, he has a right to require the creditor to call upon the principal debtor to pay off the debt. However, the existence of this right has been questioned.

The case of *Duncan, Fox & Co. v. North and South Wales Bank* [1880] LR 7 HL 348 involved certain bills discounted by the bank and indorsed by Duncan, Fox & Co. and accepted by Radford & Co. Before the bills became due Radford & Co. stopped payment. The bills were dishonoured, and Duncan, Fox & Co became liable to the bank. The bank held certain securities from Radford & Co. It was held that the bank should hand over the securities of Duncan, Fox & Co. on payment by them of the balance remaining due to the bank. On this point, *Paget on Banking*, 8th Edn., p. 618 has this to say:

a ... The real question was whether Duncan, Fox & Co., as indorsers, were entitled to the same rights as sureties on paying the bills; and, save for the words of Lord Watson quoted above, there is nothing in the judgments to support the proposition that a surety can decline to pay till the creditor has exhausted securities placed in his hands by the principal debtor.

On the contrary, the right to sue the guarantor without resorting to the securities is clearly recognised by Lord Selborne, and by Lord Blackburn. In the Scottish case of *Ewart v. Latta* b [1865] 4 Macq. 983 @. p. 987 Lord Westbury C says:

> Until the debtor has discharged himself of his liability, until he has fulfilled his own contract, he has no right to dictate any terms, to prescribe any duty, or to make any demand on his creditor. The creditor must be left in possession of the whole of the remedies which the original contract gave him, and he must be left unfettered and at liberty to exhaust those remedies, and he cannot be required to put any limitation c upon the course of legal action given by him by his contract by any person who is still his debtor, except upon the terms of that debt being completely satisfied.

Further on he says:

> The same principle prevails also in the law of England, that if a debt be due from A and B be the surety, B has no right in respect of that debt as against the creditor unless he undertakes to pay and actually does discharge it.

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Halsbury's Laws of England, Vol. 20, 4th Edn., para. 159 at p. 87 states:

> ... It is not necessary for the creditor, before proceeding against the surety, to request the principal debtor to pay, or to sue him, although solvent, unless this is expressly stipulated for, nor is it necessary for the creditor to prosecute the principal debtor for any offence he may have committed unless this is rendered essential by the terms of the guarantee, nor to e resort to securities for the guaranteed debt received by the creditor from the principal debtor, although, in certain special circumstances, it may be necessary for the creditor, before having recourse to the surety, to seek indemnity from a third person.

By making the order of stay the learned Judge appeared to think that the creditor should go against the principal debtor before going after the surety. *Halsbury's Laws of England*, Vol. 20, 4th Edn., para. 186 at p. 101 under the heading *Surety's right to compel creditor to collect* f *debt* provides:

> After the guaranteed debt has become due, and before he has been asked to pay it, the surety may require the creditor to call upon the principal debtor to pay off the debt. In the absence of agreement the creditor is, however, not bound to sue the principal debtor before suing the surety. Moreover the surety, even where he deposits the amount of the guaranteed debt, cannot without such agreement compel the creditor to proceed against the principal debtor g unless he undertakes to indemnify the creditor for the risk, delay and expense which he thereby incurs, and, apparently, satisfies him that the principal debtor is solvent.

We appreciate the good intention of the learned Judge in making the order of stay. Whatever the learned Judge may think about the matter, we do not think, in the circumstances, he has the jurisdiction either to dismiss or to stay creditor's petition.

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Also found at [1985] 2 CLJ 409

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